

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FERNANDO N DELA CRUZ,

Plaintiff,

v.

MEGAN BRENNAN, et al.,

Defendants.

Case No. [19-cv-01140-DMR](#)

**ORDER RE: MOTIONS TO PROCEED
IFP ON APPEAL AND FOR
TRANSCRIPTS AT GOVERNMENT
EXPENSE**

Re: Dkt. Nos. 185, 189

In August 2022, following a two-day bench trial, the court found in favor of Defendant Louis DeJoy, Postmaster General of the United States Postal Service (“USPS”), on Plaintiff Fernando N. dela Cruz’s claim for Family Medical Leave Act (“FMLA”) interference. After announcing its findings of fact and conclusions of law on the record, the court entered judgment for Defendant. [See Docket Nos. 163, 164.] Dela Cruz, now representing himself, filed an appeal of the court’s judgment with the Ninth Circuit Court of Appeals.

Dela Cruz now moves for leave to proceed *in forma pauperis* (“IFP”) on appeal. [Docket No. 185.] He also filed an administrative motion requesting that transcripts of the August 2022 bench trial be prepared at the government’s expense. [Docket No. 189.] Defendant did not file an opposition to the motion requesting transcripts.

Dela Cruz did not have to file the motion for leave to proceed IFP on appeal. He previously filed a motion for leave to proceed IFP in this action, which the court granted in March 2019. [Docket No. 4.] “A party who was permitted to proceed in forma pauperis in the district-court action . . . may proceed on appeal in forma pauperis without further authorization, unless . . . the district court—before or after the notice of appeal is filed—certifies that the appeal is not taken

1 in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and
 2 states in writing its reasons for the certification or finding.” Fed. R. App. P. 24(a); *see also* 28
 3 U.S.C. § 1915(a)(3) (“An appeal may not be taken in forma pauperis if the trial court certifies in
 4 writing that it is not taken in good faith.”). “‘Not taken in good faith’ means ‘frivolous.’” *Missud*
 5 *v. Nevada*, No. C-11-3567 EMC, 2012 WL 13149070, at *1 (N.D. Cal. Apr. 3, 2012) (quoting
 6 *Gray v. Hamilton*, No. C 10-4614 RS PR, 2010 WL 4281812, at *2 (N.D. Cal. Oct. 25, 2010)
 7 (quoting *Ellis v. United States*, 356 U.S. 674, 674-75 (1958))); *Hooker v. American Airlines*, 302
 8 F.3d 1091, 1092 (9th Cir. 2002). “An appeal is frivolous if it lacks any arguable basis in law or
 9 fact.” *Fabricant v. United States Ct. of Appeals for Ninth Cir.*, No. 18-CV-01965 LHK (PR),
 10 2018 WL 10811485, at *2 (N.D. Cal. Sept. 24, 2018) (citations omitted).

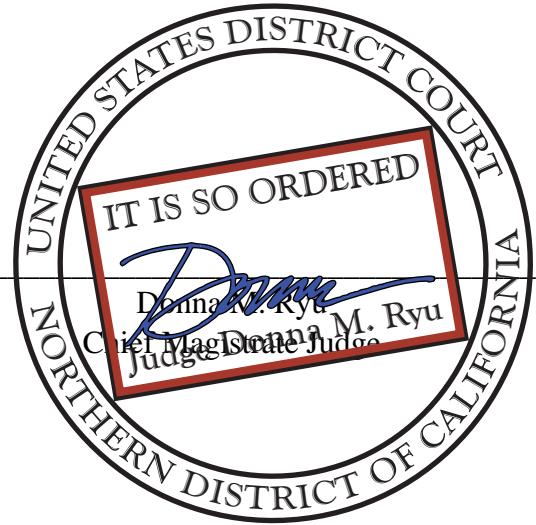
11 The court does not certify that dela Cruz’s appeal is frivolous or not taken in good faith.
 12 Accordingly, he may continue to proceed IFP on appeal and his IFP motion is denied as moot.

13 As to the administrative motion for transcripts, the court may grant a motion for transcripts
 14 at government expense only if “the trial judge or circuit judge certifies that the appeal is not
 15 frivolous” and the appeal presents a “substantial question.” 28 U.S.C. § 735(f); *Henderson v.*
 16 *United States*, 734 F.2d 483, 484 (9th Cir. 1984). “A substantial question exists where the issue
 17 before the court of appeals is ‘reasonably debatable.’” *Johnson v. United States*, No. C 10-00647
 18 LB, 2012 WL 2709543, at *1 (N.D. Cal. July 6, 2012) (quoting *Washburn v. Fagan*, No. C03–
 19 00869 MJJ, 2007 WL 2043854, *2 (N.D. Cal. July 12, 2007)). “If there is any doubt as to the
 20 merits, the issue of providing a transcript at government expense should be resolved in favor of the
 21 appellant.” *Id.* Dela Cruz’s appeal raises questions about the evidence presented during the bench
 22 trial, including the sufficiency of the evidence showing that he gave Defendant notice of his
 23 intention to take FMLA-protected leave and whether Defendant had a duty to make inquiries about
 24 whether his leave was protected by FMLA. [See Docket Nos. 179 (Mar. 20, 2023 Order Denying
 25 Motion for Reconsideration) 2-3; 184 (Notice of Appeal of Mar. 20, 2023 Order).] The court
 26 concludes that the appeal presents a “reasonably debatable” issue. Accordingly, the motion for
 27 transcripts of the August 2022 bench trial at government expense is granted. The Clerk’s Office
 28 shall provide transcripts of the proceedings on August 22-24, 2022 to dela Cruz at the

government's expense.

IT IS SO ORDERED.

Dated: June 20, 2023



United States District Court
Northern District of California